

State Bar Court
Pilot Program for Respondents with
Substance Abuse and Mental Health Issues

Program Outline

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State Bar Court Pilot Program for Respondents with Substance Abuse and Mental Health Issues

This document provides an overview of the State Bar Court Pilot Program for Respondents with Substance Abuse or Mental Health Issues (hereinafter “Pilot Program”).

I. Program Authorization

Effective January 1, 2002, Business and Professions Code sections 6230, *et seq.* were added to the State Bar Act. Section 6231 directs the Board of Governors of the State Bar of California to establish and administer an Attorney Diversion and Assistance Program (hereinafter “Lawyers Assistance Program”). Additionally, section 6140.9 provides that the State Bar shall allocate at least \$10.00 of the annual membership fee paid by active members of the State Bar to offset all or a portion of the cost of establishing and administering the Lawyers Assistance Program.

The State Bar is actively working to implement the Lawyer Assistance Program (“LAP”), which will primarily address the substance abuse and mental health problems of attorneys who are referred to LAP or who voluntarily seek to participate in LAP. The program offers support and structure to attorneys recovering from these disorders. Experts will provide consultations regarding rehabilitation and private support groups will be offered to attorneys in the program.

The Pilot Program addresses the substance abuse and mental health problems of attorneys against whom formal disciplinary proceedings have been initiated in the State Bar Court (hereinafter “respondents”).

II. Initial Scope of Pilot Program

The Pilot Program represents the first comprehensive program in the United States for addressing the identification, assessment and treatment of substance abuse and mental health problems of respondents in the discipline process. The Pilot Program is designed to protect the public, the courts and the legal profession, while respondents with substance abuse and mental health problems receive treatment.

The State Bar Court envisions that the Pilot Program will have a close and mutually beneficial relationship with LAP. The Pilot Program will neither duplicate the LAP processes nor usurp the treatment function. The Pilot Program seeks to identify and refer respondents with substance abuse or mental health problems to LAP so that respondents so afflicted may be treated and rehabilitated. A respondent must be accepted into LAP in order to be eligible for the Pilot Program.

Cognizant of its obligation to protect the public, the courts and the legal profession, the State Bar Court will retain jurisdiction over those attorneys in LAP that have pending disciplinary proceedings and will make all appropriate judicial decisions, including any determination regarding the respondent's eligibility to practice law while participating in LAP.

The State Bar Court concludes that it is most prudent to initiate the Pilot Program on a relatively small scale and on an experimental basis. In the Pilot Program's early stages, it is anticipated that processes and procedures may need to be modified in light of experience. As such, flexibility by all individuals and entities involved in the Pilot Program, including the State Bar Court, the Office of the Chief Trial Counsel and respondents will be essential.

III. Treatment and the Disciplinary Process

There are three identifiable stages at which an attorney may become involved in LAP to receive treatment. They are:

- Self-referral prior to or after the receipt of any disciplinary complaint;
- Referral by the Office of the Chief Trial Counsel following the receipt of a disciplinary complaint but prior to the initiation of a proceeding in the State Bar Court; or
- After the initiation of a disciplinary proceeding in the State Bar Court, or pursuant to a stipulation to jurisdiction by the parties in a pre-filing matter.

A respondent is entitled to make a self-referral to LAP for treatment even if he or she has a disciplinary complaint or proceeding pending. The respondent will be subject to any terms and conditions set forth by LAP for ongoing participation in that program. However, a respondent's participation in LAP does not limit or alter the State Bar Court's authority to impose or to recommend the imposition of discipline on members of the State Bar. Thus, a respondent's participation in LAP may not affect or defer a disciplinary proceeding unless the respondent is accepted into the Pilot Program.

IV. Eligibility for the State Bar Court's Pilot Program

A. Referral to LAP by the State Bar Court

In a State Bar Court proceeding, when an issue of substance abuse or mental health is raised (whether by the Deputy Trial Counsel, the respondent or the Hearing Judge), the assigned Hearing Judge may refer the matter to the Hearing Judge who presides over the Pilot Program in the appropriate venue of the State Bar Court ("Pilot Program Judge") solely to determine whether the respondent is a potential candidate for the program.

Once the referral is made, an initial status conference with the Pilot Program Judge will be scheduled as quickly as possible, preferably within one week of the referral. At the initial status conference with the Pilot Program Judge, the Judge will inform the respondent about the terms and conditions of his or her potential participation in the Pilot Program.

If the Pilot Program Judge concludes that the respondent is a good potential candidate for the program based upon the respondent's willingness to abide by the terms and conditions of the Pilot Program, and the respondent's acknowledgment that he/she has a substance abuse or mental health problem, the respondent will be referred to LAP to begin the evaluation process to determine participation eligibility in LAP. The Pilot Program Judge will submit a written referral to LAP with a date certain by which the respondent is to contact LAP to start the evaluation process. LAP will note on the written referral whether or not the respondent made contact within the time allotted and will promptly return the referral to the State Bar Court for verification of the respondent's initial compliance.

If the Pilot Program Judge does not recommend that the respondent should participate in the Pilot Program, the proceeding will be returned to the assigned Hearing Judge for normal case processing. The respondent, however, is free to pursue treatment from LAP through a self-referral.

If the respondent denies at the initial status conference that he/she has a substance abuse or mental health problem, or does not agree to contact LAP for the evaluation process, the Pilot Program Judge will inform the respondent that he/she will not be allowed to request referral to the Pilot Program at a later date in the proceedings. The Pilot Program Judge will also inform the respondent that his or her initial denial of a problem may be considered in subsequently determining whether mitigation credit for a substance abuse or mental health problem is appropriate in his/her disciplinary proceeding. If the respondent is unwilling to contact LAP or fails to contact LAP within the time set forth in the written referral, the proceeding will be returned to the assigned Hearing Judge and the disciplinary proceeding will be conducted in the normal course.

If the respondent accepts the referral to LAP and contacts LAP within the time set forth in the written referral, the proceeding will be reassigned to the Pilot Program Judge for all purposes, except that, if the respondent is not subsequently accepted into LAP, the proceedings will be returned to the originally-assigned Hearing Judge for reassignment and normal case processing.

B. Evaluation Process for Participation in LAP

Following a written referral, the evaluation process by LAP is estimated to take approximately 90 days. The respondent must comply with all terms and conditions set forth by LAP as part of the evaluation process, including any participation in group meetings, attendance at abstinence-based self-help meetings or random drug testing. Failure to comply with any condition of the evaluation process required by LAP may result in the respondent's rejection from participation in the Pilot Program.

The respondent may also be required to obtain an addiction evaluation and/or psychiatric evaluation by a treatment professional as part of the LAP evaluation process. At a minimum, such an evaluation will include: history of alcohol and drug use; past medical and psychiatric history; history of professional practice; drug testing results; review of records including collateral contacts; summary, including diagnostic considerations and formulation; and recommendations, including precautions or limitations for practice and recommendations for ongoing treatment, with the data and supporting rationale for the recommendations.

Any restrictions on the respondent's practice in either the evaluation report or the LAP Participation Agreement will be provided only as recommendations for the Pilot Program Judge to consider. For respondents participating in the Pilot Program, LAP will not place practice restrictions on the respondent as a term or condition of participation in its program. Any determination as to restrictions on practice for respondents will be made by the Pilot Program Judge and set forth in an appropriate order. LAP may require respondents to comply with any court orders regarding restrictions on practice as a condition of LAP participation.

If the respondent is accepted into LAP at the completion of the evaluation process, the respondent will provide to the Pilot Program Judge copies of the LAP Participation Agreement and the evaluation report from the treatment professional. The Pilot Program Judge will use these documents to determine the respondent's eligibility for the Pilot Program.

If the respondent is not accepted into LAP, he or she will not be eligible to participate in the Pilot Program and the proceeding will be returned to the originally-assigned Hearing Judge for re-assignment and normal case processing.

C. Stipulation as to the Disciplinary Proceeding

After the respondent is determined to be a potential candidate for the Pilot Program and is referred to LAP for an evaluation for participation, the Pilot Program Judge will also direct the respondent and Deputy Trial Counsel to discuss the preparation of a stipulation as to facts, conclusions of law and mitigating and aggravating circumstances. The Stipulation will include, inter alia, the resolution of all outstanding restitution and Client Security Fund matters; all matters currently at issue with clients or courts; restrictions on practice, if any, and member status.

The Stipulation between the parties must be submitted to the Pilot Program Judge within 90 days of the initial status conference. The parties may request a settlement conference with the Pilot Program Judge in order to facilitate a stipulation. If the respondent and the Deputy Trial Counsel are unable to reach a stipulation, the respondent will not be permitted into the Pilot Program but may continue to seek participation in LAP.

D. Eligibility Determination by Pilot Program Judge

The respondent will be ordered to appear before the Pilot Program Judge approximately 90 days after the initial referral to LAP. Based on receipt of the LAP Participation Agreement, the evaluation report from the treatment professional and the Stipulation, the Pilot Program Judge will determine the respondent's eligibility based mainly on the answers to the following four questions:

1. Is the respondent suitable or amenable to treatment?
2. Is there a nexus between the respondent's behavior and his/her substance abuse or mental health problem?
3. Is the respondent willing to enter into a Stipulation?
4. Is the range of the ultimate discipline proposed by the parties, if any, within the State Bar Court Judge's discipline parameters?

If the respondent is not accepted into the Pilot Program, the proceeding is returned to the originally-assigned Hearing Judge for reassignment and normal case processing.

If the respondent is accepted into the Pilot Program and agrees to participate in the Program, he/she must sign a contract which will include the following terms, among others:

- Stipulation as to fact, conclusions of law and any mitigating or aggravating circumstances;
- In the event that the respondent is terminated from the Pilot Program, the Stipulation will be filed, will become public and will be processed as part of the underlying disciplinary proceeding;
- An agreement to abide by all terms and conditions of the respondent's LAP Participation Agreement;
- Arrangement for payment of administrative and/or other fees;
- An agreement as to the "sanctions" and "incentives" that may be imposed based on the respondent's failure to comply with any condition of the program or his/her completion of each stage of the program.

Prior to signing the Pilot Program Contract, the Pilot Program Judge will, based upon the stipulation, provide the respondent with a tentative indication of the discipline that will be imposed or recommended if the respondent successfully completes the Pilot Program and the discipline that will be imposed or recommended if he or she does not successfully complete the Pilot Program.

If the respondent does not agree to sign the Pilot Program Contract, the proceeding will be returned to the originally-assigned Hearing Judge for reassignment and normal case processing. The Stipulation will be rejected and will not be binding upon either the respondent or the State Bar. The respondent, however, is free to pursue treatment from LAP.

If the respondent is accepted into the Pilot Program, the Stipulation will not be effectuated until the respondent either successfully completes the Pilot Program or is removed from the Program. If all conditions are met and the respondent is accepted into the Pilot Program, the matter will remain assigned to the Pilot Program Judge for all purposes.

E. Right to Seek Review

The respondent is entitled to seek review of a Pilot Program Judge's decision to deny admittance into the Program or to terminate the respondent from the Program pursuant to rule 300 of the Rules of Procedure of the State Bar. However, the respondent is not entitled to seek review of a Pilot Program Judge's decision to deny or terminate him or her from the Pilot Program if that decision was based on the respondent's denial of acceptance into LAP or termination from LAP. The decisions and determinations of LAP are not subject to review by the State Bar Court.

V. Participation in the State Bar Court's Pilot Program

A. Status Reports and Conferences

The Pilot Program will provide oversight of its participants through status conferences held, at a minimum, every three months. In order to determine the respondent's progress, LAP will provide written status reports to the Pilot Program Judge every three months. Based on objective data, the reports will: (1) confirm the respondent's compliance with the terms and conditions of the LAP Participation Agreement, (2) disclose any incidents of non-compliance, and (3) provide any relevant case information which can be appropriately shared with the Pilot Program Judge in open court.

The Probation Unit of the State Bar will also submit a written report on the respondent's compliance with all other terms and conditions of the Pilot Program Contract. The status reports by the Probation Unit and LAP will be provided to the court no later than seven (7) days prior to the scheduled status conference. Neither the Probation Unit nor LAP will be required to make regular, personal appearances at the status conferences. However, the Pilot Program Judge may occasionally request a telephonic appearance by a representative of the Probation Unit or LAP to answer questions or provide clarification regarding a submitted status report.

In order to meet the goals of the Pilot Program, there will be circumstances when non-compliant respondents will need to appear before the court in an expeditious manner. The purpose of this procedure is to allow substantial flexibility and discretion to LAP and the Probation Unit in dealing with non-compliance before notifying the court. LAP and/or the Probation Unit will notify the court within five (5) days of receiving information of any of the following incidents of non-compliance:

- A single unexcused failure to test for drugs or alcohol;
- A second positive drug or alcohol test;
- A second unexcused failure to attend a counseling session;
- A new complaint of misconduct based on an event that occurred after acceptance into the Pilot Program.

The Pilot Program Judge will have the discretion to order the respondent to personally appear at a special status conference or handle the matter in any other appropriate manner.

All treatment-related documents, including status reports, evaluation reports and tests results, will be maintained in a confidential envelope inside the court's file and shall not be duplicated by any party. Treatment progress and status reports will only be used

in court by the parties to evaluate the respondent's progress in the treatment program. The confidential envelope will be ordered sealed upon successful completion of or termination from the Pilot Program.

B. Sanctions and Incentives

It is envisioned that the Pilot Program will provide substantially more attorney accountability than under the current system. Based on the status reports submitted by LAP and the Probation Unit, the Pilot Program Judge will be able to monitor a respondent's progress and order appropriate sanctions or incentives.

Both sanctions and incentives are crucial to an effective court-based program. A sanction occurs after the prohibited act and as a response to that act. An incentive is the removal of a program obligation or requirement contingent on a targeted behavior. Incentives will be used whenever possible because they are generally far more effective than sanctions in altering behavior. Possible incentives include:

- Reduction in term of the Pilot Program at each three month status conference, resulting in a minimum term of 18 months;
- Waiver of the personal appearance requirement at a status conference;
- Reduction of time on inactive status while in the Pilot Program;
- Credit for inactive status towards any period of actual suspension imposed as part of discipline;
- Reduction in the frequency of status conferences.

Conversely, in the event the respondent fails to comply with the terms of the Pilot Program, possible sanctions include:

- Involuntary inactive enrollment;
- Publication of the attorney's name in the *California Bar Journal* or on the State Bar's website;
- Increased frequency of status conferences;
- Loss of credit for inactive status while in the Program towards actual suspension imposed as part of discipline;
- Termination from the Pilot Program.

C. Term of the Pilot Program

The respondent will be required to participate for a minimum term of 36 months from formal admission into the Pilot Program. However, with earned incentives, the respondent may complete the program in a minimum of 18 months. No respondent may

complete the program without a one-year substance-free certificate from LAP, or a recommendation from a mental health professional. It should be noted that probationary conditions may extend beyond the term of the formal Pilot Program requiring continued compliance with the respondent's LAP Participation Agreement.

The time necessary to successfully complete the Pilot Program may vary significantly depending upon the nature and extent of the respondent's substance abuse, mental health, or upon his/her performance in the Program.

While the respondent is participating in the Pilot Program, further processing of the disciplinary proceeding will be deferred. All applicable statutes of limitation in the disciplinary proceeding will be tolled while the respondent is participating in the Pilot Program. However, as deemed necessary for the protection of the public, the Pilot Program Judge may require the respondent to be enrolled as an inactive member of the State Bar during all or part of his/her participation in the Program.

If the respondent is terminated from the Pilot Program without completing it, that fact may be used as an aggravating factor in the underlying disciplinary proceeding. In addition, the Stipulation entered into by the respondent and the Deputy Trial Counsel will be filed with the State Bar Court, will become public and will be processed as part of the disposition of the underlying disciplinary proceeding.

If the respondent successfully completes the Pilot Program, any period of inactive enrollment that has been imposed by the Pilot Program Judge may be credited towards the respondent's period of actual suspension in the underlying disciplinary proceeding. However, if the respondent is dismissed from the Pilot Program, he/she will not be given credit for the period of inactive enrollment.

Respondents may choose to be involved in a drug or alcohol rehabilitation program or mental health treatment program other than LAP. However, unless that alternative treatment program is accepted by LAP as part of the respondent's participation in LAP, the respondent will not be accepted into the Pilot Program and the underlying disciplinary proceeding may not be deferred pending treatment. The mitigating effect of the respondent's substance abuse or mental health problem and subsequent rehabilitation will depend upon the nature and extent of the showing made in the course of the disciplinary proceeding.

VI. Disciplinary Offenses Excluded from the Pilot Program

Respondents who have been convicted of crimes which qualify for summary disbarment pursuant to Business and Professions Code section 6102 shall not be entitled to participate in the Pilot Program.

However, no other respondent or category of charged offense will be automatically excluded from potential participation in the Pilot Program. Even in those cases which may ultimately result in disbarment, the respondent's participation in the Pilot Program may not only assist the respondent with his/her mental health problems or in his/her recovery from substance abuse, but may also assist in demonstrating his/her rehabilitation for purposes of a later reinstatement proceeding.

VII. Confidentiality

The fact that the respondent is participating in the State Bar Court's Pilot Program shall be public. Likewise, the respondent's successful completion of the Pilot Program or dismissal from the Program shall be public. However, all information concerning the nature and extent of the respondent's treatment shall be confidential. This confidentiality shall be:

- Absolute unless waived by the attorney;
- Exempt from the provisions of Section 6086.1;
- Not discoverable or admissible in any civil proceeding without the written consent of the attorney to whom the information pertains;
- Not discoverable or admissible in any disciplinary proceeding without the written consent of the attorney to whom the information pertains;
- Except with respect to the provisions of subdivision (c) of Section 6232, the limitations on the disclosure and admissibility of information in this section shall not apply to information relating to an attorney's noncooperation with or unsuccessful completion of LAP, or any subcommittee or agent thereof, or to information otherwise obtained by the Office of the Chief Trial Counsel, by independent means, or from any other lawful source.